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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

8	WILLIAM VASQUEZ MARTINEZ,)	No. C 08-5232 RMW (PR)
9	Petitioner,)	ORDER GRANTING RESPONDENT'S
10	v.)	MOTION TO DISMISS; DENYING
11	MIKE MCDONALD, Warden,)	PETITIONER'S MOTION TO GRANT THE
12	Respondent.)	WRIT AND MOTION FOR AMENDED
13)	MOTION FOR JUDGMENT
)	(Docket Nos. 29, 31, 32)

Petitioner, a state prisoner proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the petition should not be granted. Respondent has moved to dismiss the petition, in part, because one claim is unexhausted and two claims are untimely. Petitioner has filed a statement of non-opposition. Petitioner has also filed a motion to grant the writ of habeas corpus, and an amended motion for judgment.¹ Having reviewed the papers and the underlying record, the court GRANTS respondent's motion to dismiss, and DENIES petitioner's motion to grant the writ, and petitioner's amended motion for judgment.

DISCUSSION

I. Motion to Dismiss

On December 2, 2004, petitioner was convicted by jury in Santa Clara County Superior Court for aiding and abetting attempted murder, and related offenses. On October 6, 2005, petitioner

¹ Petitioner's request to amend his motion for judgment is granted. (Docket No. 34.)

1 was sentenced to a term of 16 years to life. On May 25, 2007, the California Court of Appeal
 2 affirmed. On August 22, 2007, the California Supreme Court denied review.

3 On November 19, 2008, petitioner, through counsel, filed the instant petition, raising five
 4 claims. On January 13, 2009, petitioner requested a stay of proceedings so that he could go back to
 5 state court and exhaust Claims 4 and 5, using the procedure outlined in Kelly v. Small, 315 F.3d
 6 1063 (9th Cir. 2003). On September 29, 2009, the court granted the petitioner's request, and stayed
 7 the proceedings. On April 5, 2010, and May 20, 2010, petitioner filed a motion to proceed with the
 8 federal petition. On May 24, 2010, the court granted the motion to proceed, and lifted the stay. On
 9 August 6, 2010, the court issued an order to show cause to the respondent as to why the petition
 10 should not be granted. On August 9, 2010, the court granted counsel for petitioner's motion to
 withdraw as attorney, allowing the petitioner to proceed pro se.

11 On May 26, 2011, respondent filed a motion to dismiss the petition, in part. Respondent
 12 argues that Claim 2 is unexhausted, and Claims 4 and 5 are untimely. Respondent states that, in the
 13 court's September 29, 2009 order granting petitioner's request to stay, the court should have
 14 followed the three-step procedure directed by Kelly. That is, the court should have first dismissed
 15 petitioner's unexhausted claims before allowing petitioner to exhaust those claims in state court.
 16 Then, when petitioner returned to federal court, he should have moved to amend his petition to
 17 include the newly-exhausted claims. Under that procedure, petitioner's newly-exhausted claims
 18 would be untimely. See King v. Ryan, 564 F.3d 1133, 1141-43 (9th Cir. 2009). Instead, the court
 19 stayed the mixed petition, allowing petitioner to exhaust his claims while the court held his mixed
 20 petition in abeyance. Although a court can stay a mixed petition under Rhines v. Weber, 544 U.S.
 21 269, 278-88 (2005), here, the court would have had no occasion to do so without first finding "good
 22 cause" for failing to exhaust earlier. Although the court did not explicitly give petitioner an
 23 opportunity to allege "good cause," a review of the declaration submitted by petitioner's counsel on
 24 January 13, 2009, demonstrates no showing of "good cause." (Docket No. 4.)

25 Nevertheless, on July 14, 2011, petitioner filed a statement of non-opposition to respondent's
 26 motion to dismiss as to Claims 2, 4, and 5. Petitioner's statement of non-opposition makes it
 27 unnecessary to discuss the propriety of the stay procedure used in this instance. Respondent's
 28 motion to dismiss Claims 2, 4, and 5 is GRANTED.

1 II. Motion to Grant Petition / Amended Motion for Entry of Default Judgment

2 On August 6, 2010, the court issued an order to respondent to show cause why the petition
 3 should not be granted. The order to show cause directed respondent to file an answer or a motion to
 4 dismiss on procedural grounds, in lieu of an answer. Thereafter, the court granted four timely
 5 requests for an extension of time to file a response. On May 26, 2011, respondent filed a timely
 6 motion to dismiss. On June 8, 2011, petitioner filed a motion to grant the petition for habeas corpus.
 7 On July 25, 2011, petitioner filed a motion for judgment on the petition. On October 11, 2011,
 8 petitioner filed a request to amend his motion for judgment to include default on the petition. All
 9 three pleadings read together generally move for a default judgment against respondent for failing to
 file an answer as directed by the court.

10 Default judgments are generally disfavored and “[c]ases should be decided upon their merits
 11 whenever reasonably possible.” Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986). Moreover,
 12 respondent timely filed a motion to dismiss on procedural grounds, in lieu of an answer, as directed.
 13 Accordingly, petitioner’s motions for a default judgment are DENIED.

14 **CONCLUSION**

15 Respondent’s motion to dismiss is GRANTED. Claims 2, 4, and 5 are DISMISSED.

16 Respondent shall file with the court and serve on petitioner, within ninety days of the date
 17 this order is filed, an answer conforming in all respects to Rule 5 of the Rules Governing Section
 18 2254 Cases, showing cause why a writ of habeas corpus should not be granted. Respondent shall
 19 file with the answer and serve on petitioner a copy of all portions of the underlying state criminal
 20 record that have been transcribed previously and that are relevant to a determination of the issues
 21 presented by the petition. If petitioner wishes to respond to the answer, he shall do so by filing a
 22 traverse with the court and serving it on respondent within thirty days of the date the answer is filed.

23 It is petitioner’s responsibility to prosecute this case. Petitioner is reminded that all
 24 communications with the court must be served on respondent by mailing a true copy of the
 25 document to respondent’s counsel. Petitioner must keep the court and all parties informed of any
 26 change of address by filing a separate paper captioned “Notice of Change of Address.” He must
 27 comply with the court’s orders in a timely fashion. Failure to do so may result in the dismissal of this
 28 action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

1 The clerk is directed to terminate the docket numbers 29, 31, and 32.
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IT IS SO ORDERED.

3 DATED: FFDI DFF

Ronald M. Whyte
4 RONALD M. WHYTE
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM VASQUEZ MARTINEZ,

Case Number: CV08-05232 RMW

Plaintiff,

CERTIFICATE OF SERVICE

v.

MIKE MCDONALD et al,

Defendant.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 17, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

William Vasquez Martinez F00355
Pelican Bay State Prison
Housing C4 #219
P.O. Box 7500
Crescent City, CA 95532

Dated: November 17, 2011

Richard W. Wiking, Clerk
By: Jackie Lynn Garcia, Deputy Clerk